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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1029 96

UNION PACIFIC RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

ANNABELLE C. UTTERBACK, WILLIAM R. UTTERBACK, MARJORIE E. UTTERBACK, AND FRANK S. SEVER, GUARDIAN AD LITEM FOR SAID WILLIAM R. UTTERBACK AND MARJORIE E. UTTERBACK.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON
AND BRIEF IN SUPPORT THEREOF.

ROY F. SHIELDS,
ROBERT F. MAGUIRE,
Counsel for Petitioner;
THOMAS W. BOCKES,
Of Counsel for Petitioner.

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**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON.**

MAY IT PLEASE THE COURT:

The petitioner, Union Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to review the final decree of the Supreme Court of Oregon in a suit brought by petitioner to restrain respondents Annabelle C. Utterback, William R. Utterback and Marjorie E. Utterback¹ from prosecuting in the courts of Cali-

¹ William R. Utterback and Marjorie E. Utterback are minors for whom respondent Frank S. Sever was appointed guardian ad litem after the suit was commenced (R. 31).

formia an action at law against petitioner to recover damages under the Federal Employers Liability Act (United States Code, Title 45, Sections 51 *et seq.*; 45 U. S. C. A. Secs. 51 *et seq.*) on a cause of action arising in Oregon.

In support thereof petitioner respectfully shows:

A.

Jurisdiction.

(a) The statutory provision sustaining the jurisdiction of this Court in this cause is Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, United States Code, Title 28, Section 344 (b).

(b) The date of entry of the decree of the Supreme Court of Oregon here sought to be reviewed was March 14, 1944 (R. 57). Said decree was and is the final decree of that Court, which was and is the highest court of law or equity in the State of Oregon in which a decision of said matter could be had. This petition for writ of certiorari, supporting brief and the record in said cause are being filed in this Court within three months after the entry of said final decree.

(c) This case arises under the Federal Employers Liability Act (35 Stat. 65; 36 Stat. 291; 36 Stat. 1167; 53 Stat. 1404; United States Code, Title 45, Sections 51-59) and under Section 6 (8) of the Interstate Commerce Act (39 Stat. 604; United States Code, Title 49, Section 6 (8)) and presents questions of law directly involving the construction of those statutes; and the rulings of the Court below were such that this petitioner was and is deprived of rights, privileges and immunities claimed by it under said statutes and under the Fourteenth Amendment to the Constitution of the United States.

(d) The jurisdiction of this Court to review said decree is sustained by said Section 237 (b) of the Judicial Code, by subdivision (a) of Section 5 of Rule 38 of this Court, and by the decisions of this Court in *N. W. Pacific R. R. Co. v. Bobo*, *Admx.*, 290 U. S. 499; *Swinson v. Chicago, St. P. M. & O. R. R. Co.*, 294 U. S. 529; *Chicago Great Western R. R. Co. v. Rambo*, *Admx.*, 298 U. S. 99; *Great Northern Railway v. Leonidas*, 305 U. S. 1; *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44; *Miles, et al., v. Illinois Central R. Co.*, 315 U. S. 698; *Blodgett v. Silberman*, 277 U. S. 1, and *Virginia v. Imperial Coal Co.*, 293 U. S. 15.

B.

Summary Statement of the Matter Involved.

I. Legal Questions Presented.

This case presents the following legal questions:

1. May the claimant's privilege of choosing venue under Section 6 of the Federal Act² be so exercised during the present war emergency as to compel the carrier either (a) to violate its statutory obligation to expedite the movement of military traffic,³ or (b) waive its right to be heard on the merits of the damage claim.

² Section 6 of the Federal Employers Liability Act provides:

"Under this chapter an action may be brought in a district Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." This section also confers concurrent jurisdiction on the state courts. 45 United States Code, Sec. 56.

³ The Interstate Commerce Act provides:

"In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic." United States Code, Title 49, Section 6 (8); 49 U. S. C. A. Sec. 6 (8).

2. May such a claimant be enjoined from arbitrarily selecting a forum in which the carrier cannot defend itself without interrupting the physical operation of its trains in the transportation of essential war traffic.

3. Would such an injunction constitute an encroachment upon the prerogatives of the President or Secretary of War under Section 1361, Title 10, United States Code.⁴

II. *Summary of Facts Involved.*

Harold P. Utterback, husband of respondent Annabelle C. Utterback and father of the other respondents, while employed as a brakeman on one of petitioner's freight trains, was killed in an accident which occurred near Portland in Multnomah County, Oregon, on February 7, 1942 (R. 2). All witnesses to the accident, which involved two trains, resided in or near Portland (R. 8 *et seq.*). All of the respondents and the said Harold P. Utterback also resided in Portland (R. 3).

At all times there were open and functioning within the State of Oregon regularly constituted courts, both State and Federal, of original and general jurisdiction which were conveniently available to respondents for the prompt and effective enforcement of any meritorious claim against petitioner arising out of said accident (R. 15). April 27, 1942, respondents caused to be instituted in the Superior Court of Los Angeles County, California, a civil action against petitioner to recover \$100,000 damages alleged to

⁴ This section provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable" (10 U. S. C. Sec. 1361).

have been sustained by respondents because of the death of said Harold P. Utterback (R. 7, 25). Petitioner operates a line of railroad extending into Los Angeles, which is over 1100 miles by rail from Portland (R. 16).

September 26, 1942, petitioner brought suit in the Circuit Court of the State of Oregon for Multnomah County to enjoin respondents and their representatives from prosecuting the damage action in California and for incidental relief (R. 1). Petitioner's complaint in the Oregon suit showed that it could not properly defend itself in the California damage action without withdrawing from railroad service for a week or more a large number of its employees who could not be replaced by others because of labor shortages (R. 8-11, 14); that by direction of the Government, petitioner was engaged in transporting large numbers of troops and vast quantities of vital war material, the prompt movement of which was essential to the prosecution of the war (R. 11-12); that to handle such emergency war traffic petitioner was compelled to work all of its train service employees full time, most of them overtime, and some of them on double shifts (R. 12); that the withdrawal of one or more train crews from active service for use as witnesses in the California case would interrupt the physical operation of some of petitioner's trains and retard the movement of emergency war traffic (R. 13-14); and that in these circumstances the prosecution of respondents' damage case in California would require petitioner either to violate its paramount obligation to the Government during the present war crisis, or to waive its constitutional right to present its defense to the damage claim (R. 17).

Respondents filed a general demurrer to petitioner's complaint upon the grounds that the relief sought by petitioner would be inconsistent with Section 6 of the Federal Employers Liability Act as construed by this Court, and

with Section 2, Article IV, and Article VI of the Constitution of the United States (R. 29-30). Respondents' demurrer was overruled by the Circuit Court (R. 32). Respondents elected to stand on their demurrer and refused to further plead (R. 33). On December 3, 1942, the Circuit Court entered a decree⁵ substantially as prayed for by petitioner (R. 33).

Respondents appealed to the Supreme Court of Oregon⁶ (R. 34). The only error assigned by respondents on such appeal was that the decree of the Circuit Court was in conflict with the venue provisions of the Federal Employers Liability Act as construed by this Court and with Section 2, Article IV, and Article VI of the Constitution of the United States (36-37). Petitioner contended that respondents' privilege of choosing a forum under the Federal Act is not absolute under all conditions, but like other civil privileges is subject to the paramount interests of the public in time of war; that respondents' normal right to choose a distant forum is subordinate to the carrier's right and duty to expedite the movement of military traffic in obedience to Governmental command (49 U. S. C. Sec. 6 (8)); and that the privilege of choosing a forum may not be so arbitrarily

⁵ Notwithstanding this decree, respondent proceeded with the prosecution of her damage case in California. Petitioner pleaded the Oregon decree in bar and in abatement in the California case but did not attempt to use its Oregon employees as witnesses in the California case. The Superior Court of California declined to give faith and credit to the Oregon decree and the damage case went to judgment. Petitioner appealed to the District Court of Appeals, which affirmed the judgment. *Leet v. Union Pacific R. Co.*, 144 Pac. (2d) 64. The Supreme Court of California granted petitioner's application to review and the damage case is now pending before that Court. The facts stated in this footnote were not shown in the record before the Supreme Court of Oregon but they are stated here for the information of this Court if they should be deemed relevant.

⁶ Such appeal did not stay the injunction issued by the Circuit Court. *Tou v. Gong*, 87 Ore. 454, 460 (170 Pac. 936, 938); *Jaloff v. United Auto Indemnity Co.*, 121 Ore. 187, 193, 194 (253 Pac. 883, 885).

exercised as to deprive the carrier of its opportunity to defend without violating its wartime obligations (R. 46, 48).

February 8, 1944, the Supreme Court of Oregon rendered an opinion directing that the decree of the Circuit Court be reversed upon the ground that such decree was in conflict with Section 6 of the Federal Employers Liability Act as construed by this Court in *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U. S. 44, and in *Miles v. Illinois Central R. Co.*, 315 U. S. 698 (R. 45, 48) and constituted an encroachment upon the prerogatives of the President under Section 1361, Title 10, United States Code (R. 49). The opinion is not yet officially reported in the Oregon Reports but is reported in Volume 146, Pacific Reporter (Second Series) at p. 76.

February 28, 1944, petitioner applied to the Supreme Court of Oregon for a rehearing (R. 52). March 14, 1944, the court denied said application and ordered that the cause be remanded to the Circuit Court with directions to dismiss the suit, but stayed the issuance of its mandate until March 30, 1944 (R. 57). This opinion is not yet officially reported in the Oregon Reports but is reported in Volume 146 Pacific Reporter (Second Series) at page 769. March 28, 1944, the Supreme Court of Oregon entered an order⁷ further staying the issuance of its mandate until the final determination of the cause in this Court (R. 58).

C.

Reasons Relied on for Allowance of Writ.

Petitioner submits that this Court should review said decision of the Supreme Court of Oregon for the following reasons:

⁷ Under Oregon law the decree of the Circuit Court remains in effect until that court receives the mandate of the Supreme Court and enters a decree as directed in the mandate. Oregon Compiled Laws Annotated, Sec. 10-813; *The Holladay Case*, 29 Fed. 226, 229.

1. The Oregon Court decided Federal questions of substance not theretofore determined by this Court as follows:

(a) It decided, purportedly on the authority of the *Miles* and *Kepner* cases, that a claimant's venue privileges under Section 6 of the Federal Employers Liability Act could be exercised without regard to the carrier's wartime obligations or its opportunity to defend itself in the forum selected (R. 45, 48). That question has not been determined by this Court.⁸

(b) The Oregon Court undertook to determine petitioner's obligations under Section 6 (8) of the Interstate Commerce Act (R. 46), which has not been construed by this Court.

(c) The Oregon Court undertook to determine the power of the President and of the Secretary of War under Section 1361, Title 10, United States Code, with respect to restricting the venue of suits against carriers engaged in transporting troops, munitions and military supplies (R. 46-49). That question has not been decided by this Court.

2. The Oregon Court decided Federal questions in a way probably not in accord with applicable decisions of this Court. So far as the private interests of the parties were concerned, the issue decided was not whether respondents had the right to subject petitioner to "the normal expense and inconvenience of trial in permitted places" (315 U. S. 705), but whether they could exercise that right in such a way as to deprive petitioner of a reasonable opportunity to defend against their claim. From the public point of

⁸ The *Kepner* case (314 U. S. 44) was decided November 10, 1941, before the United States was at war. The *Miles* case (315 U. S. 698) was decided by this Court March 30, 1942, shortly after this country entered the war, but the decision was based upon a record made up during normal peacetime conditions. In neither case did this Court have occasion to consider the decisive questions in the present case.

view, the issue decided was not whether respondents have the right to burden interstate commerce indirectly and incidentally by invoking "the requirements of orderly, effective administration of justice" (*Hoffman v. Foraker*, 274 U. S. 21, 23), but whether they have the right to interfere with the physical operation of interstate trains carrying military traffic in time of war. Those issues were decided by the Oregon Court in a way probably not in accord with the decisions of this Court in such cases as *Davis v. Farmers Co-operative Co.*, 262 U. S. 312, *Michigan Central R. Co. v. Mix*, 278 U. S. 492, *Denver & Rio Grande R. Co. v. Terte*, 284 U. S. 284, *Baltimore & Ohio R. Co. v. Kepner*, *supra*, and *Miles v. Illinois Central R. Co.*, *supra*.

3. The questions so decided involve matters of serious public concern. The prosecution of respondents' damage action in a forum far distant from the place where the accident occurred was in conformity with a practice which has become widespread during the present emergency⁹ (R. 4, 21). The effect of such a practice upon the prosecution of the first World War was reflected in General Order No. 18 issued by the Director General of Railroads April 9, 1918, (R. 27) and sustained in *Alabama & Vicksburg R. Co. v. Journey*, 257 U. S. 111. This Court has taken judicial notice of the serious effects of such practices upon interstate transportation even during normal times. (*Davis v. Farmers Co-operative Co.*, 262 U. S. 312.)

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court directed to the Supreme Court of Oregon commanding that Court to

⁹ The record shows that during the period from August 1, 1940, to September 1, 1942, respondents' California representative instituted some fifty damage suits in California courts against carriers on causes of action arising in other states (R. 4, 21).

certify and to send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case entitled on its docket "Union Pacific Railroad Company, a corporation, Respondent, v. Annabelle C. Utterback, William R. Utterback and Marjorie E. Utterback, Appellants," and that the Court review and decide the Federal questions presented and reverse the decree of the Supreme Court of Oregon entered in said cause, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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